Supreme Court, U.S.
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No. 98-950

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GLEN H. SENGPIEL, DONALD E. KELLY
and DONALD R. GOTTSCHALK,

Petitioners,

vs.

THE B.F. GOODRICH COMPANY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
Reasons for Granting the Writ	1
I. Petitioners' Breach Of Fiduciary Claim.	1
A. There is a Genuine Conflict Between the Decision Below and the Eighth Circuit's Decision in *Howe v. Varity Corp.*, 36 F.3d 746, 756 (8th Cir. 1994).	1
B. Goodrich Acted in a Fiduciary Capacity Under ERISA § 4044 in Selecting and Assigning Participants and Allocating Funds and Responsibility to the UGTC Plans.	4
C. Principles of Contract Law as Well as Trust Law Should Be Utilized to Develop a Federal Common Law of Rights and Obligations Under ERISA-Regulated Plans.	6
II. Petitioners' Contract-Based Claim.	8
A. The ERISA Standard for the Vesting of Welfare Benefits Should Be the Same for Non-Union as for Union Retirees.	8
B. *Curtis-Wright v. Schoonejongen*, 514 U.S. 73 (1995), Did Not Create a Virtually Irrebuttable Presumption Against Vesting.	9
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Alexander v. Primerica Holdings, Inc., 967 F.2d 90 (3d Cir. 1992) 8, 9

Bower v. Bunker Hill Co., 114 F.R.D. 587 (E.D. Wash. 1986) *on remand from* 725 F.2d 1221 (9th Cir. 1984) 8, 9

Curtis-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995) 6, 9

Eardman v. Bethlehem Steel Corp., 607 F. Supp. 196 (W.D.N.Y. 1984) 8

Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989) 6, 7

Howe v. Varity Corp., 36 F.3d 746 (8th Cir. 1994) .. 1, 2, 3, 4

Hughes Aircraft Co. v. Jacobson, No. 97-1287, 67 U.S.L.W. 4122 (Jan. 25, 1999) 6

In re White Farm, 788 F.2d 1186 (6th Cir. 1986) 8, 9

International Association of Machinists and Aerospace Workers v. Masonite, 122 F.3d 228 (5th Cir. 1997) 9

Jensen v. Sipco, Inc., 38 F.3d 945 (8th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995) 9

Cited Authorities

	Page
Lockheed Corp. v. Spink, 517 U.S. 882 (1996)	6
Sprague v. General Motors Corp., 133 F.3d 388 (6th Cir.) (*en banc*), *cert. denied*, __ U.S. __, 118 S. Ct. 2312 (1998)	8
UAW v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984)	8, 9
Varity Corp. v. Howe, 516 U.S. 489 (1996)	2, 7
Statutes:	
ERISA § 3(21)(a)(i)	5
ERISA § 404(a)(1)	7
ERISA § 502(a)(3)	2
ERISA § 4044	4, 5
ERISA § 4044(a)	4
Other Authorities:	
17 Am. Jur. 2d, *Contracts* § 276	9
Restatement (Second) of Contracts § 318(3)	4

APPENDIX

Page

Appendix A — Goodrich Disclosure Schedule Section 4.12(b)(ii)(A) to the Joint Venture Agreement, "Employee Selection Method" 1a

STATEMENT OF THE CASE

Respondents, referring to the "Highlights" booklet, imply that Goodrich reserved a right of amendment in its welfare benefit plans. (Michelin Brief at 1-2; Goodrich Brief at 1-2.) But, as found by the District Court, the Highlights booklet does not meet the requirements of a Summary Plan Description. (App. B at 45a-46a.) Respondents then refer to the reservation of rights clause contained in the 1986 Summary Plan Description for the Retiree Health Care Plan. (Michelin Brief at 2; Goodrich Brief at 2.) But this plan was adopted after petitioners had been assigned to the UGTC plans and is therefore not material. (App. B at 22a.) As the courts below found, the SPDs at issue contain no clause reserving a right to amend, suspend, or terminate the plans. (App. A at 4a, App. B at 46a.)

Respondents, contending that petitioners benefited by their transfer to UGTC, then refer to Goodrich's decision to reduce the medical benefits in 1990 by increasing the medical deductible from $100 to $150 a month for one covered individual and from $200 to $300 for two or more. (Michelin Brief at 5; Goodrich Brief at 3; Jt. Apx. 764-66.) But this modest decrease in medical benefits was more than offset by a $40.00 a month increase in the pension benefit. (App. B at 29a; Jt. Apx. 764-66.) The transferred corporate retirees did not receive the $40.00 a month pension increase because they had been transferred to the UGTC pension plan. They were not benefited by the transfer.

REASONS FOR GRANTING THE WRIT

I.

PETITIONERS' BREACH OF FIDUCIARY CLAIM.

A. There is a Genuine Conflict Between the Decision Below and the Eighth Circuit's Decision in *Howe v. Varity Corp.*, 36 F.3d 746, 756 (8th Cir. 1994).

Respondents argue that petitioners are manufacturing a conflict because the Eighth Circuit's holding in *Howe v. Varity Corp.*, 36 F.3d

746, 756 (8th Cir. 1994) ("*Howe II*"), was grounded on false communications made in connection with the transfer of welfare plan obligations. In *Howe II*, there were three categories of plaintiffs: (1) ten individual retirees, who, like the petitioners, had retired before Massey Combines was created and who had been involuntarily transferred to Massey Combines; (2) a class of active, pre-divestiture employees who had been fraudulently induced to sign on with Massey Combines and who had retired before its bankruptcy; and (3) a class of active, pre-divestiture employees who had been fraudulently induced to sign on with Massey Combines and were still employed by Massey Combines at the time of bankruptcy. This Court in granting certiorari considered (1) whether the employer was acting in its capacity as an ERISA "fiduciary" when it deliberately mislead the employees, (2) whether in misleading the employees, the employer violated ERISA's fiduciary obligations, and (3) whether ERISA § 502(a)(3) authorized plan beneficiaries to bring a lawsuit seeking relief for individual beneficiaries harmed by the administrator's breach of fiduciary duty. *Varity Corp. v. Howe*, 516 U.S. 489, 492 (1996). In considering these questions, this Court considered only the claims of the second and third classes of plaintiffs described above, that is, those employees who had been deceitfully induced to transfer to Massey Combines.

This Court did not review on certiorari that part of *Howe II* that considered Varity and Massey-Ferguson's transfer of the retirees who had been involuntarily transferred to Massey Combines.

> [F]or as we construe Varity's petition, it does not sufficiently call into question the District Court's holding that Varity breached a fiduciary duty with respect to the Massey-Ferguson retirees whose benefit obligations had been involuntarily assigned to Massey Combines. With these limitations, we turn to the questions presented.

Varity Corp. v. Howe, *supra*, 516 U.S. at 496. Therefore, that part of the opinion in *Howe II*, part V, dealing solely with the ten individual retirees, was not reviewed by this Court. Part V of *Howe II* has nothing to do with false communications made in connection with the transfer of welfare plan obligations because there were no false

communications to the retirees. They were simply transferred, involuntarily, to the successor's plans.

There is an important difference between active employees and those employees who have already retired. In a corporate spinoff, active employees who work for the business being divested have a choice. They may elect to transfer to the new company, they may choose to find employment elsewhere, or, if eligible, they may take early retirement. Retirees, on the other hand, as in this *Sengpiel* case, are simply transferred without their consent, and sometimes without their knowledge, to the retirement rolls of the new entity's plans. "Their consent was not solicited" either by Goodrich or Uniroyal. (Ong Depo., Jt. Apx. 548.) In short, active employees who elect to sign on with the new company, by voluntarily accepting employment with the successor, consent to the transfer of their pension and welfare obligations to their new employer, whereas employees who have already retired do not consent.

Michelin argues that a plan sponsor can free itself of "contractually created duties" by simply taking back the obligation and then *terminating and extinguishing* it. (Michelin Brief at 14.) This assertion cannot be correct. Goodrich's obligation to its retirees is not illusory. If a plan sponsor has created a "contractually created duty," then it cannot "free itself" of that obligation by terminating and extinguishing it. What Michelin really means is that welfare benefits are gratuitous. But this notion is contrary to the understanding of employees and their families, who plan for retirement on the assumption that their benefits are a firm obligation of their employer. The employee relies upon the "character, credit, and substance" of the employer for whom he or she has worked. What the Eighth Circuit meant in *Howe II* is that the employer "cannot unilaterally relieve [itself] of obligations to the individual retirees" to *sponsor, provide, and be responsible for* retiree pension and welfare benefits. Also, if Michelin is right in contending that the "obligation" of the employer is at the will of the employer, then why did Goodrich enter into an indemnification agreement with UGTC? (App. B at 28a; Jt. Apx. 924-25.)

The correct legal analysis is that while Goodrich could delegate its obligation to provide retiree benefits to UGTC, it could not "free itself" of its retiree obligations by assigning them to UGTC. Goodrich's contractual obligation to its retirees was not assignable between Goodrich and its retirees because Goodrich could not by its own act or by any agreement with UGTC cast off its liability and substitute UGTC without the consent of the retirees. This is precisely the point that the Eighth Circuit made in part V of *Howe II*, citing *Restatement (Second) of Contracts* § 318(3), comment d. Goodrich retained its primary responsibility to provide and sponsor welfare benefits to its retirees. It was for that reason that it entered into an indemnification agreement with UGTC.

B. Goodrich Acted in a Fiduciary Capacity Under ERISA § 4044 in Selecting and Assigning Participants and Allocating Funds and Responsibility to the UGTC Plans.

The District Court put the issue succinctly:

> To some extent, spinning off members of a plan is *sui generis*; it falls easily into no category. . . . [T]he Court essentially must choose whether the spinoff is more akin to 1) amending, modifying or terminating the then-existing plans (in which case it would not be a fiduciary act), or 2) managing or administering those plans (in which case it would be a fiduciary act).

(App. B at 40a.) The District Court, and the Court of Appeals, decided that all of Goodrich's actions in implementing the spinning off of its tire division came down on the side of "amending, modifying, or terminating" the previously existing plan and not on the "managing" or "administering" side.

ERISA § 4044(a) provides in part:

> **(a) Order of priority of participants and beneficiaries**
>
> In the case of the termination of a single-employer defined benefit plan, the plan *administrator* shall allocate

> the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order: . . . (Emphasis added.)

Petitioners do not question that Goodrich's decision to divest itself of its tire business and its decision to terminate its one pension plan covering all Goodrich employees and retirees and their beneficiaries, whether salary or wage, and create four separate plans (Salaried Tire, Wage Tire, Salaried Non-Tire, and Wage Non-Tire) were employer/settlor functions not impacted by ERISA. However, Goodrich, after creating the four separate plans, was necessarily performing an administrative-fiduciary function when it selected and assigned participants and allocated funds to the four newly created plans. This is so because the decision as to which participants to assign to which plan and what funds should be allocated to each plan necessarily involved the exercise of "discretionary authority" or "discretionary control" "respecting management or disposition of [plan] assets." ERISA § 3(21)(a)(i). The pigeonholing of participants into one of the four plans is a congressionally defined fiduciary function under ERISA § 4044 (included under Title IV — Plan Termination Insurance, Subtitle C — Terminations).

In fact, in selecting and assigning participants and funds, Goodrich stated that it complied with ERISA § 4044:

> Effective March 14, 1986, The B.F.Goodrich Retirement Program was split into four plans based on Section 4044 of ERISA. Separate wage and salary plans for both Tire Group and remaining BFG employees were established. . . .

(Goodrich Disclosure Schedule Section 4.12(b)(ii)(A) to Joint Venture Agreement, "Employee Selection Method," Jt. Apx. 62, 838, Reply Brief Apx. A.) The selection/assignment/allocation process is more than a "ministerial application of a percentage classification to implement [Goodrich's] business decision" not amounting to an exercise of discretion.

Michelin cites *Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995), *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996), and *Hughes Aircraft Co. v. Jacobson*, No. 97-1287, 67 U.S.L.W. 4122 (Jan. 25, 1999) for the proposition that spinning off its tire division was a settlor function. (Michelin Brief at 14-15.) *Schoonejongen* holds that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." 514 U.S. at 78. *Lockheed Corp. v. Spink* decided that Lockheed acted not as a fiduciary but as a settlor when it amended the terms of a plan to include retirement programs, but this Court did not decide whether the Retirement Committee members acted as fiduciaries when they paid out benefits according to the terms of the Amended Plan. 517 U.S. at 892. *Hughes Aircraft Co. v. Jacobson*, *supra*, holds that:

> The act of amending a pre-exising [sic] plan cannot as a matter of law create two *de facto* plans if the obligations (both preamendment and postamendment) continue to draw from the same single, unsegregated pool or fund of assets.

67 U.S.L.W. 4125. *Hughes* is distinguishable from this *Sengpiel* case because Goodrich created four new, separate plans, selected participants from the terminated plan, assigned participants to one of the four plans, and allocated funds and responsibility. The same single, unsegregated pool was not used to pay benefits. In fact, John Ong, Goodrich's chief executive officer, insisted that the transferred pension plan retain its separate identity "unless all plans which are part of the merger are fully funded." (Ong's letter to Gottschalk, Exh. A, App. B at 62a-64a.) Those retirees who were assigned to the new tire pension plans, either salaried or wage, were then assigned to the UGTC retirement rolls for purposes of providing welfare benefits.

C. Principles of Contract Law as Well as Trust Law Should Be Utilized to Develop a Federal Common Law of Rights and Obligations Under ERISA-Regulated Plans.

Michelin also argues that contract assignment principles do not square with ERISA's regulatory scheme. (Michelin Brief at 16-19.) Pre-ERISA actions challenging denial of benefits were governed by principles of contract law. *Firestone Tire and Rubber Co. v. Bruch*,

489 U.S. 101, 112 (1989). As this Court said in *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996):

> [T]rust law does not tell the entire story. After all, ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection. (Citations omitted.) . . . Congress "expect[ed] that the courts will interpret this prudent man rule (and other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans," *id.*, at 302, 3 Leg. Hist. 4569, as they "develop a 'federal common law of rights and obligations under ERISA-regulated plans.' "

Respondents, and the courts below, confuse the design of a plan with the management and administration of the plan. Admittedly, Goodrich can design any plan, or no plan, as it wishes. But once it has designed a plan, it must administer and manage that plan "solely in the interests of the participants and beneficiaries." ERISA § 404(a)(1). Moreover, it is questionable whether trust law principles should be exclusively applied to unfunded welfare plans where there is no trust corpus.

Michelin argues that ERISA "implicitly permits one plan sponsor to be substituted for another — without requiring any amendment or modification of the underlying employee benefit plan documents." (Michelin Brief at 19.) But this begs the question. The issue is, assuming Goodrich could substitute UGTC as the plan sponsor, can Goodrich thereby extinguish its obligation and responsibility to provide welfare benefits to the transferred retirees to the same level as it provides to those retirees who were not transferred?

II.

PETITIONERS' CONTRACT-BASED CLAIM.

A. The ERISA Standard for the Vesting of Welfare Benefits Should Be the Same for Non-Union as for Union Retirees.

Respondents argue that the standard for union retirees is different than the standard applicable to non-union retirees (such as petitioners), that the decisions can be reconciled on the basis of a collective bargaining agreement and that there is therefore no conflict in the circuits. For three reasons, this Court should reject respondents' argument that there is an appropriate double standard.

First, among the cases petitioners cited that apply a standard at odds with *Sengpiel* are those involving *non*-union employees, *e.g.*, *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90, 96 (3d Cir. 1992), and *Bower v. Bunker Hill Co.*, 114 F.R.D. 587, 594-95 (E.D. Wash. 1986) *on remand from* 725 F.2d 1221 (9th Cir. 1984) (class included both union and non-union, and same standard applied). *See also Eardman v. Bethlehem Steel Corp.*, 607 F. Supp. 196 (W.D.N.Y. 1984).

Second, *nothing* in the decisions in *Sengpiel* or *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir.) (*en banc*), *cert. denied*, __ U.S. __, 118 S. Ct. 2312 (1998) (or in any other appellate case in which non-union retirees lost) distinguishes the long line of pro-retiree decisions on the grounds that they concerned union retirees. Indeed, in *In re White Farm*, 788 F.2d 1186, 1192 (6th Cir. 1986), the Sixth Circuit itself declared that even though the retiree benefit claim was brought by non-union retirees solely under ERISA, the court must "look to basic contract law," and it "must, in this case as in *Yard-Man* and the other collective bargaining agreement cases, interpret the contract's terms." *Id.*[1] *White Farm* went on to note that "courts may draw inferences or make presumptions as this court has done in

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1. *Yard-Man* refers to *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984), which found — directly contrary to *Sprague* and *Sengpiel* — that "silence" on the vesting question should not be seen as an indication that benefits are not vested, but rather the proper "inference" is that the benefits are indeed vested. This part of *Yard-Man* has been followed by a number of the other circuit decisions.

construing collective bargaining agreements providing welfare benefit plans." *Id.* at 1193.

Third, analytically, there is not reason why there should be a double standard. While *Yard-Man* and other union decisions cited federal labor law as one of a number of factors supporting its adoption of the pro-retiree "inference," it also cited the body of pre-ERISA precedent applying the modern "contractual" view of retirement benefits even for non-union retirees. 716 F.2d at 1480-82. Non-union retirees are as powerless as union retirees to bargain for benefits after they retire — and this fact supports the same inference that the original intent underlying the benefits was that they were to last for life.

Furthermore, non-union retirees should get the benefit of even *more* favorable rules of contract construction than those enjoyed by union retirees. Since non-union retirees' rights stem from documents drafted solely by the employer (in contrast to the union setting), the court should employ the *contra proferentum* doctrine, construing ambiguous language most strongly against the party who has selected that language. 17 Am. Jur. 2d, *Contracts* § 276.

B. *Curtis-Wright v. Schoonejongen*, 514 U.S. 73 (1995), Did Not Create a Virtually Irrebuttable Presumption Against Vesting.

Respondents are plainly wrong in characterizing *Curtis-Wright v. Schoonejongen*, 514 U.S. 73 (1995), as some sort of watershed case which created a very strong presumption against vesting and which essentially overruled the principles underlying cases such as *Primerica*, *supra*, *Jensen v. Sipco, Inc.*, 38 F.3d 945 (8th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995), and *Bower v. Bunker Hill Co.*, *supra*. *Schoonejongen* does not even mention any of these cases, and gives no indication that it disapproves of their reasoning. Indeed, in *International Association of Machinists and Aerospace Workers v. Masonite*, 122 F.3d 228, 231-33 (5th Cir. 1997), the citation to *Schoonejongen* is but one illustration that it had no effect on the law concerning "vesting" of retiree health benefits. Both before and after *Schoonejongen*, the law remains the same: There are no "magic words" which are necessary to create "vested" rights. *Sengpiel* deviates from these authorities and creates a presumption against vesting which is virtually irrebuttable.

CONCLUSION

For these reasons, the Petition for Writ of Certioriari should be granted.

Respectfully submitted,

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